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Opinion of the Fourth Circuit Dated July 30, 1970

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 13,746

THE BLACK HAWK CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

(Argued May 5, 1970—Decided July 27, 1970.)

Before BOREMAN, BRYAN and WINTER, Circuit Judges.

W. S. Blakeney (Blakeney, Alexander & Machen on brief) for Petitioner; Robert E. Williams, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallett-Prevost, Assistant General Counsel, and William F. Wachter, Attorney, National Labor Relations Board, on brief) for Respondent, and Cornelius J. Collins, Jr. (Patricia E. Eames, General Counsel, Industrial Union

Department, AFL-CIO, and Textile Workers Union of America, AFL-CIO, on brief) for Intervenors.

Albert V. Bryan, Circuit Judge:

Here in question is the National Labor Relations Board's finding that Black Hawk Corporation violated Sections 8(a)(3) and (a)(1) of the Labor Relations Act, 29 USC 158(a)(3) and (a)(1), by the 1967 layoff of 17 employees. Specifically, the Board found they were thus penalized because of their union leanings and in order to affect the outcome of a pending representation election. The decision is attacked by the Company as lacking in substantial proof. We agree with this contention and decline to enforce that part of the Board's order.[1] This disposition renders moot the plaint of leniency in the remedy suggested by the intervening unions, the Industrial Union Department, AFL-CIO and the Textile Workers Union of America, AFL-CIO.

The Black Hawk Corporation, located in Greenville, South Carolina, is a wholly-owned subsidiary of J. P. Stevens & Co., Inc. It was established in 1960 as a warehouse for the storage and handling of baled cotton to be used exclusively by Stevens' twenty-one consuming plants in North and South Carolina, Georgia, and Tennessee. While Stevens uses some independently owned warehouse facilities, it is uncontested that throughout the middle of

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(Deleted by court order 9/10/70)

1. That part of the Board's order dealing with the direction of a new election, due to Black Hawk's refusal to divulge its employees' names and addresses to the Union is enforced. By its failure to contest this finding, Black Hawk acknowledges dereliction of the duty required of it under *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). See *NLRB* v. *Wyman-Gordon Co.*, 394 US 759 (1969).

1967, Black Hawk, as Stevens' only central cotton storage [illegible], processed the bulk of Stevens' cotton. The operation consists of weighing the raw material on arrival, and testing and classifying it before consolidation into large lots suitable for shipment to the consuming plants.

While the warehouse supply remains fairly constant, the inbound shipments vary during the cotton year. Beginning in late August, volume increases, with the acme in December and January. Ordinarily, there is a slack period from April or May until early August. This fluctuation has caused Black Hawk periodically and correspondingly to adjust the number of its employees. Since 1964, when the warehouse was enlarged, Black Hawk has had as many as 71 people working there during the heavy season. For the three years prior to 1967, the force was reduced for want of work at an average rate of 25 employees annually.

In 1967 there was a steep decrease from 51 to 31 workers in the warehouse, where employees were inclined to unionization, and an increase of four workers in the shop, where a converse sympathy prevailed. These variations occurred during the nine weeks beginning with the charging union's petition for an election on August 22 and ending with the balloting on October 25. The precipitateness of the diminution and its timing occasioned the complaint. Noteworthy here, however, terminations were assigned in inverse seniority order, without reference to activity or disinterest in the organization drive.

Opposing the charge, Black Hawk pleaded economic justification. Cotton is purchased on the open market, and in anticipation of a "short crop" and in the face of new Government production controls, Stevens bought unusually high amounts in late 1966 and early 1967, long before it knew of the Black Hawk union movement which began in June 1967. As a result, in 1967 the usual April-May slow season did not arrive until September. By that time, Black